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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 748

JOHN ALBERT BAKEWELL,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1970

No.

JOHN ALBERT BAKEWELL,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, John Albert Bakewell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 7, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinions of the United States District Court for the Middle District of Florida appear in the Appendix hereto; the District Court opinions are not reported.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 7, 1970. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on August 27, 1970, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 22(2) of this Court.

QUESTION PRESENTED

Whether a sentence of imprisonment and its affirmance on appeal violate the due process clause of the Fifth Amendment and the confrontation and assistance of counsel clauses of the Sixth Amendment where the judge rejected counsel's request that the information in the presentence investigation report be divulged so that he could correct any errors contained therein and the report did contain false and misleading derogatory information.

CONSTITUTIONAL PROVISIONS AND PROCEDURAL RULE INVOLVED

United States Constitution:

Fifth Amendment. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;

nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defense.

Federal Rules of Criminal Procedure:

Rule 32. *Sentence and judgment.*

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) Report. The report of the presentence investigation shall contain any prior criminal

record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

STATEMENT OF THE CASE

The petitioner was charged in the United States District Court for the Middle District of Florida with unlawfully selling amphetamine tablets. He entered a plea of guilty before a judge who deferred sentence pending a presentence investigation. Thereafter he was sentenced to imprisonment by another judge of the district court.

The petitioner then filed a motion for reduction of sentence. His counsel indicated a desire to inspect the presentence investigation report so that he might correct any errors contained in it. He was not permitted to inspect the report and the motion was denied. Petitioner then appealed to the United States Court of Appeals for the Fifth Circuit, seeking an opportunity

to determine if the presentence report contained errors, and if so, to correct them in the district court.

On motion of the petitioner, after the notice of appeal was filed, the district judge allowed the presentence investigation report to be made a part of the record on appeal. The petitioner then learned for the first time that the report did, in fact, contain false and misleading derogatory information.

The Court of Appeals affirmed and held that the disclosure of the contents of a presentence report to a defendant is a matter of discretion with the court. The Court of Appeals also held that the restrictive rules of evidence properly applicable to the conduct of a trial are inapplicable to the imposition of a sentence (Appendix, pp. 11, 13-14).

The basis of jurisdiction of the United States District Court for the Middle District of Florida is 18 U.S.C. §3231, the petitioner having been charged with an offense against the laws of the United States.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THE SUPREME COURT ON A FEDERAL QUESTION AND CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

In holding that a sentencing judge need not disclose any of the contents of a presentence investigation re-

port, the decision of the Fifth Circuit here conflicts squarely with the decision of the Fourth Circuit in *Baker v. United States*, 4th Cir. 1968, 388 F.2d 931. In *Baker* the Court of Appeals for the Fourth Circuit required a disclosure:

> "Admittedly, there are items in the report of which the defendant is rightfully entitled to be advised. The sentencing court should apprise him, orally from the bench, of at least such pivotal matters of public record as the convictions and charges of crime, with date and place, attributed to him in the report. As this may be done without handing the defendant or his counsel the report, the procedure could not lead to a destruction of the probation officer's sources of information.
>
> "The defendant should then be given an opportunity to refute or explain any record disparagement of his earlier deportment. Indeed, this is vital in any consideration of the report." *Baker v. United States*, 4th Cir. 1968, 388 F.2d 931, 933.

In stark contrast, the Fifth Circuit here held that the contents of a presentence report can be kept secret from the defendant notwithstanding his assertion that the report contains false and misleading derogatory information.

The Fifth Circuit would not even allow the defendant to know at the district court level whether there is derogatory material in the report. His counsel is

helpless to assist him for he is faced with unknown statements by unknown persons.

In *Baker* the Fourth Circuit vacated the district court's judgment in order to allow the defendant an opportunity to correct that portion of the presentence report that "... was misleading with respect to Baker's prior behavior, the mistake accounting for a more severe punishment than would have been ordered had the report been accurate." 388 F.2d 931, 932. The Fourth Circuit held:

> "Notwithstanding the obvious care of the sentencing judge in ascertaining condign punishment, we feel the judgment should be vacated to permit Baker, if he can, to erase any such error." *Baker v. United States*, 4th Cir. 1968, 388 F.2d 931, 932.

In this case the Fifth Circuit held that the disclosure of the contents of a presentence report is a matter of discretion (Appendix, pp. 11, 13). Simply stated, the Fourth Circuit holds that a disclosure is required to some extent; the Fifth Circuit holds that a disclosure is not required at all.

The decision of the Fourth Circuit referred to the Supreme Court's decision in *Townsend v. Burke*, 334 U.S. 736, 68 S. Ct. 1252, 92 L.Ed. 1690 (1948). In *Townsend* this Court held that where a defendant in a state court is not afforded an opportunity to correct or controvert the erroneous basis of punishment and sentence is pronounced on information extensively and material-

ly false, the proceedings are lacking in due process and are constitutionally invalid.

The *Townsend* decision cannot be reconciled with the Fifth Circuit's decision in this case. Unless a defendant can ascertain the material upon which his sentence is to be based and point out the errors and inaccuracies, his sentence may well be pronounced on information extensively and materially false. Under *Townsend* the proceedings would lack due process and be constitutionally invalid.

These conflicts justify the grant of certiorari to review the judgment below.

2. THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT, AS TO THE PROPER INTERPRETATION OF RULE 32(c) (2), FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 32(c) (2), Federal Rules of Appellate Procedure, provides in part:

> "The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government."

In this case the Fifth Circuit has held that:

> "The disclosure of the contents of a presentence report to a defendant is a matter of discretion with the court." (Appendix, p. 13).

The decision's validity is questionable when considered in the light of the Fifth Amendment's guarantee of due process and the Sixth Amendment's guarantee to the right to confrontation of witnesses and the assistance of counsel.

Although some of this Court's opinions strongly suggest that a defendant has a constitutionally protected right to examine and rebut a presentence investigation report (*Specht v. Patterson*, 386 U.S. 605; *Kent v. United States*, 383 U.S. 541; *Townsend v. Burke*, 334 U.S. 736), this Court has not ruled directly on the point. Certiorari was granted on this point in *Waller v. Florida*, 395 U.S. 975, 89 S. Ct. 2125, 23 L.Ed.2d 764 (1969), but the case was decided on another point and this point was not considered or decided. ____ U.S. ____, 90 S. Ct. 1184, 25 L.Ed.2d 435, 441.

A substantial amount of scholarly comment has been published both in favor of and in opposition to disclosure.[1]

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[1]Bar Association of the District of Columbia, Junior Bar Section, Discovery in Criminal Cases, 33 F.R.D. 47, 127 (1963); Guzman, Defendant's Access to Presentence Reports in Federal Criminal Courts, 52 Iowa L. Rev. 161 (1966); Higgins, Confidentiality of Presentence Reports, 28 Albany L. Rev. 12, 38 (1964); Lorensen, The Disclosure of Defense of Presentence Reports in West Virginia, 69 W. Va. L. Rev. 159, 166 (1967); Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv. L. Rev. 1281 (1952); Note, Due Process and Legislative Standards in Sentenc-

In addition, persuasive recommendations favoring mandatory disclosure of material in presentence reports have recently been made by judges, lawyers and legal scholars under the auspices of the American Bar Association,[2] the American Law Institute,[3] and the President's Commission on Law Enforcement and Administration of Justice.[4]

It is apparent that the extent to which presentence report material is made available to parties varies considerably from court to court, judge to judge and even case to case. There is an absence of any real uniformity or even consistency in the federal judicial

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ing, 101 U. Pa. L. Rev. 257 (1952); Note, Employment of Social Investigation Reports in Criminal and Juvenile Proceedings, 58 Colum. L. Rev. 702 (1958); Note, Procedural Due Process at Judicial Sentencing for Felony, 81 Harv. L. Rev. 821 (1968); Note, Right of Offenders to Challenge Reports Used in Determining Sentences, 49 Colum. L. Rev. 567 (1949); Tappan, Crime, Justice and Correction, 1960, p. 558; Comment, Federal Rules of Criminal Procedure 32(c) (2); Confidentiality or Constitutionality 1966 2 Linc. L. Rev. 66; Note, 1958, 58 Col. L. Rev. 702; Keve, The Probation Officer Investigates, 1960, pp. 6-15; Roche, The Position for Confidentiality of the Presentence Investigation Report, 1965, 29 Albany L. Rev. 206; Parsons, The Presentence Investigative Report be preserved as a Confidential Document, Fed. Prob., March 1964, p.3; Gronewold, Presentence Investigation Practices in the Federal Probation System, Fed. Prob., Sept. 1958, pp. 27, 31; Sharp, The Confidential Nature of Presentence Reports, 1955, 5 Cath. U.L. Rev. 127; Hincks, In Opposition to Rule 34(c) (2), Proposed Federal Rules of Criminal Procedure, Fed. Prob., Oct.-Dec. 1944, p. 3.

[2]American Bar Association Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures, Approved Draft §4.4 (1968).

[3]American Law Institute, Model Penal Code §7.07(b) (1962).

[4]President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 144-45 (1967).

system. There is a pressing need for a definitive interpretation of Rule 32(c) (2). Under what circumstances should presentence report material be disclosed? May the sentencing judge decline to disclose the report regardless of the material in it? Is he required to disclose only derogatory material obtained from public records or must he disclose all derogatory material? Must he disclose the entire report? Must the sources of the material in the report be disclosed?

There is a need for a delineation of guidelines and standards. A writ of certiorari should be issued so that this important question of federal law can be settled by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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September 11, 1970

APPENDIX

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969
D. C. Docket No. 68-115-Cr.-T

No. 27,715

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN ALBERT BAKEWELL,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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Before JONES, WISDOM, and COLEMAN, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

WISDOM, Circuit Judge, Dissenting.

Issued as Mandate: July 7, 1970

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27715

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN ALBERT BAKEWELL,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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(July 7, 1970)

Before JONES, WISDOM and COLEMAN, Circuit Judges.

PER CURIAM: The appellant, John Albert Bakewell, is a truck driver who was indicted on four counts of unlawfully selling and possession for the purpose of sale of amphetamine tablets, a depressant or stimulant drug within the meaning of 21 U.S.C.A. § 321(v). Bakewell entered a plea of not guilty as to all counts. He later changed his plea on Count 1 to a plea of guilty and the other counts were subsequently dismissed. One of the judges of the court accepted the plea of guilty and deferred sentence pending a presentence investigation. Thereafter Bakewell was given a 6-months sentence by another judge of the court.

On the day he was to commence serving his sentence Bakewell filed a motion for reduction of sentence and his counsel indicated a desire to inspect the presentence investigation report so that he might correct any errors contained therein. He was not permitted to inspect the report. Bakewell's motion for reduction of sentence and seeking probation was denied. This appeal followed. On appeal he urges that he should have been given probation rather than confinement, that he was entitled to be sentenced by the judge who took his plea rather than by another, and that he should have had an opportunity to inspect the presentence report and to prove if he could that statements in it were wrong and if wrong, he should have been resentenced in the light of the corrected report.

There is no merit in the contention that Bakewell should have been given probation. His sentence was only one-half of what it might have been.

It is the better practice in cases where a trial is had before a court with or without a jury for the judge presiding at the trial to impose the sentence. However, the imposition of a sentence by another judge of the same court is not void. *Rogers v. United States,* 10th Cir. 1965, 350 F.2d 298; *Owens v. Hunter,* 10th Cir. 1948, 169 F.2d 971. There is less need for the sentence to be imposed by a judge accepting a plea of guilty than in the case where an evidentiary trial has been held. Rule 25[1] does not preclude the application of the principle here announced.

The American Bar Association and the American Law Institute in their proposals for the revision of criminal procedures recommend that a person convicted of a crime or his attorney should be permitted to see a report of a presentence investigation. American Bar Association Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures, Approved Draft § 4.4, 1968; American Law Institute, Model Penal Code § 7.07(b), 1962. These proposals have not been and we have no assurance that they will be adopted into the Federal Rules of Criminal Procedure. In our decision of this case we look to the precedents of this Court. In the most recent of the decisions of this Court the rule is thus stated:

---

[1] "After Verdict or Finding of Guilt. If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial." Fed.R.Crim.P. 25(b).

> "The disclosure of the contents of a presentence report to a defendant is a matter of discretion with the court. The restrictive rules of evidence properly applicable to the conduct of a trial are inapplicable to the imposition of a sentence." United States v. Lloyd, 5th Cir. 1970, ____ F.2d ____ [No. 27414, April 20, 1970].

This rule is not novel and has been applied many times. *United States v. Chapman*, 5th Cir. 1969, 420 F.2d 925; *Good v. United States*, 5th Cir. 1969, 410 F.2d 1217; *Roeth v. United States*, 5th Cir. 1967, 380 F.2d 755.

The appellant's motion for a stay is moot and therefore is denied.

Finding no merit in any of the appellant's contentions, the judgment and sentence of the district court is

AFFIRMED.

WISDOM, Circuit Judge, dissenting:

The liberty of an individual and the length of that individual's imprisonment often turn on unsupported statements in a pre-sentence report by an overworked probation officer functioning as investigator, psychologist and psychiatrist. To my mind, the pre-sentence report is out of place in an adversary system unless the defendant is informed of the substance of the materials on which the court will rely and has no opportunity to correct error and to show mitigating circumstances. In this case where the defendant pleaded guilty, the report was the court's only source of informa-

tion on the offense for which the defendant was sentenced.

I am unimpressed with the precedental value of the short per curiam opinions cited by the majority and others that might have been cited. We have been playing "follow-the-leader" without giving consideration to the development of judicial thinking in the field of sentencing. I agree with the standards recommended in the American Bar Association Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures, Approved Draft § 4.4 1968[1] and

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[1] 4.4 Presentence report, disclosure; parties.

(a) Fundamental fairness to the defendant requires that the substance of all derogatory information which adversely affects his interests and which has not otherwise been disclosed in open court should be called to the attention of the defendant, his attorney, and others who are acting on his behalf.

(b) This principle should be implemented by requiring that the sentencing court permit the defendant's attorney, or the defendant himself if he has no attorney, to inspect the report. The prosecution should also be shown the report if it is shown to the defense. In extraordinary cases, the court should be permitted to except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which has been obtained on a promise of confidentiality. In all cases where parts of the report are not disclosed under such authority, the court should be required to state for the record the reasons for its action and to inform the defendant and his attorney that information has not been disclosed. The action of the court in excepting information from disclosure should be subject to appellate review.

(c) The resolution of any controversy as to the accuracy of the presentence report should be governed by the principles stated in sections 4.5(b), 5.3(d) 5.3(f), and 5.4(a).

the American Law Institute, Model Penal Code § 7.07(b) 1962. For an excellent treatment of the subject, see Note, Procedural Due Process at Judicial Sentencing for Felony, 81 Harv. L. Rev. 821, 835 *et seq.*

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27715

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN ALBERT BAKEWELL,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(August 27, 1970)

Before JONES, WISDOM and COLEMAN,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

WISDOM, Circuit Judge, dissents in the denial of the petition for rehearing and the petition for rehearing en banc.

Goldberg, Circuit Judge, dissents in the denial of the petition for rehearing en banc.

ORDER

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

versus No. 68-115-CR-T.

JOHN A. BAKEWELL, JR.

(Entered March 27, 1969)

THIS CAUSE came on to be heard upon the motion of defendant filed March 21, 1969, which the Court will consider as a motion under the provisions of Rule 35, Federal Rules of Criminal Procedure. The proceedings

at the sentencing hearing on March 14, 1969, and the proceedings at the hearing on said motion were reported and are available for transcription. The Court has considered said motion, the memoranda in support thereof contained therein, and argument of counsel for defendant and the Government at hearing, and upon consideration, it is,

ORDERED and ADJUDGED:

That said motion is denied.

DONE and ORDERED at Tampa, Florida, this 27 day of March, 1969.

ORDER

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

versus No. 68-115-CR-T.

JOHN A. BAKEWELL, JR.

(Entered May 8, 1969)

THIS CAUSE comes on to be heard upon the motion of defendant, John Albert Bakewell, Jr., that the presentence investigation report be included in the record on appeal in this cause. The records before the Court contain no evidence that defendant made a request

to examine the presentence investigation report after plea and prior to sentence, and I have no such memory. From experience and in the application of common sense I do not believe that such a request should be granted generally. Of necessity and to be of assistance to the court such a report must contain hearsay matters. These frequently include statements by members of a defendant's family and close associates which are given only under the assumption that they are confidential and which if disclosed, would detrimentally affect personal relations and destroy subsequent lines of communication between defendant and those reporting to the probation officer. Such matters might well be disputed by defendant in his own mind and disclosure of them to defendant could well result in factual disputes at sentencing, thus spawning endless factual determinations which would frustrate rather than aid justice. It must be assumed, and it has been my experience that probation officers are sensitive to and respectful of the need for objective reporting and entirely responsive to their obligations of office. Judges, of course, are presumed to be trained to disregard immaterial prejudicial matter, if any should appear, and to require further investigation to personally determine at sentencing or otherwise the facts concerning any prejudicial matter deemed material which should appear in a report. It is my view that a requirement that copies of presentence investigation reports be furnished defendants prior to sentencing would result in sterile reports, which would be of assistance to no one.

The above remarks do not apply in this case or to this defendant since the presentence investigation re-

port in this case does not contain statements by defendant's family or friends which could be deemed prejudicial to him, and because as noted, defendant made no request for such a report prior to sentencing. They are included because this case is on appeal and I feel obligated to give briefly my views on the matter. The proceedings at sentencing on March 14, 1969 and at the hearing on March 25, 1969, on the motion for modification of sentence have been transcribed and I am informed will be included in the record on appeal. I believe that they speak for themselves. Since the Appellate Court would have no way of intelligently passing on this matter without having access to the presentence investigation report, I intend to grant defendant's motion that it be included in the record on appeal and made available to him and government counsel for use in connection with the appeal. Being advised, it is,

ORDERED AND ADJUDGED:

1. That defendant's motion dated May 5, 1969, t[illegible] the report of presentence investigation in his case be filed with the Clerk of this Court to be included in the record of this cause on appeal should be and it is hereby GRANTED.

2. The Probation Officer of this Court is directed promptly to furnish to the Clerk the original of the presentence investigation report for the defendant, John Albert Bakewell Jr., retaining a copy for his files.

3. The Clerk of this Court is directed to treat such report as confidential, include the original, a copy or copies thereof in the record on appeal in this cause and furnish a copy thereof to counsel for defendant and to counsel for the government only.

DONE and ORDERED at Tampa, Florida, this 8 day of May, 1969.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 748

JOHN ALBERT BAKEWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 12–18) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1970. A petition for rehearing and petition for rehearing *en banc* were denied on August 27, 1970. The petition for a writ of certiorari was filed on September 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

407-424—70

QUESTION PRESENTED

Whether petitioner could properly be sentenced to six months' imprisonment without seeing the contents of a presentence investigation report where no request for disclosure of the report was made before sentencing.

STATEMENT

Petitioner, charged with four counts of unlawful sale and possession of amphetamines within the meaning of 21 U.S.C. (Supp. V) 321(v), pleaded guilty to one count of selling amphetamines in violation of 21 U.S.C. (Supp. V) 331(q)(2) in the United States District Court for the Middle District of Florida. The other counts were subsequently dismissed and sentence was deferred until completion of a presentence investigation report. After consideration of the report, which contained no record of any previous conviction or offenses (S. Tr. 3–4),[1] the court sentenced petitioner to six months' imprisonment.[2]

On the day he was to commence serving his sentence, petitioner filed a motion for reduction of sentence (Pet. App. 19). At the hearing, petitioner requested that he be allowed to inspect the presentence investigation report to ascertain whether it contained possibly misleading information regarding his financial background (M. Tr. 7–8). This request was denied as was the motion for reduction of sentence (Pet. App.

[1] "S. Tr." and "M. Tr." refer respectively to the transcripts of the sentencing hearing and of the modification of sentence hearing and have been filed by the government with this Court.

[2] Under 21 U.S.C. (Supp. V) 333(b)(1), petitioner could have been imprisoned for up to 5 years or fined up to $10,000 or both.

19–20; M. Tr. 20–21). Petitioner's subsequent motion to include the presentence investigation report in the record on appeal was granted (Pet. App. 20), and he now claims that the report contains "false and misleading derogatory information (Pet. 5). The court of appeals affirmed (one judge dissenting), holding that disclosure of the contents of a presentence report is a matter within the discretion of the trial court (Pet. App. 12–18). A petition for rehearing and petition for rehearing *en banc* were denied, with two judges dissenting from the denial of rehearing *en banc* (Pet. App. 18–19).

ARGUMENT

Petitioner's claim that he had an absolute right to see the presentence investigation report was properly rejected by the court below. Under Rule 32(c)(2) of the Federal Rules of Criminal Procedure, which provides that a sentencing court "may disclose to the defendant" material contained in a presentence report, disclosure is discretionary. *Gregg* v. *United States*, 394 U.S. 489, 492.

The issue of whether presentence reports should be shown to defendants as a matter of right has been given considerable attention by the Advisory Committee on the Federal Rules. In amending Rule 32 in 1966, the Committee weighed arguments favoring and opposing disclosure and recommended the discretionary Rule which this Court promulgated. See Notes of Advisory Committee on Rules 18 U.S.C. (Supp. V) App., p. 1203. Recently, the Committee has recommended that the rule be amended to provide that the

report be shown to the defendant "unless in the opinion of the court the report contains information which if disclosed would be harmful to the defendant or other persons." See Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, Rule 32.2. Since the Committee is presently considering this amendment, we do not believe it would be appropriate for the Court, at this time, to reexamine its decisions indicating that it is not a denial of due process of law for a sentencing court to rely on a presentence investigation report without disclosing the report to the defendant or giving him an opportunity to rebut it. *Williams* v. *New York,* 337 U.S. 241; *Williams* v. *Oklahoma,* 358 U.S. 576. See, also, *Specht* v. *Patterson,* 386 U.S. 605, 606–608; *North Carolina* v. *Pearce,* 395 U.S. 711, 726.

At all events, petitioner in this case made no request to see the contents of the presentence investigation report before sentencing; he first raised the issue at the hearing on a motion to modify the sentence. Although the trial judge denied this request, he subsequently disclosed the entire report to the defense and ordered the report to be made part of the record on appeal. In this order the court observed: "Judges, of course, are presumed to be trained to disregard immaterial prejudicial matter, if any should appear, and to require further investigation to personally determine at sentencing or otherwise the facts concerning any prejudicial matter deemed material which should appear in the report" (Appellant's Appendix to brief in court of appeals A11–A12). Nor does the record

suggest, as petitioner argues, that the court based the sentence on any specific unfavorable matter in the report.[3] Rather, the record indicates that the court imposed this sentence because it was convinced that "traffic in amphetamine tablets is one that is dangerous, and particularly when it is used among long distance trucking operators it not only harms them but it is a menace to society in general" (S. Tr. 9; M. Tr. 19).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1970.

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[3] In the court below, petitioner argued (Brief for Appellant, pp. 5–6) that he could rebut a statement in the report which he said exaggerated the number of pills that he sold. At no point in the record, however, is there any indication that the court considered anything other than the 20,015 pills that petitioner had admitted selling when he pleaded guilty.

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In the Supreme Court of the United States

October Term, 1970

John Albert Bakewell, Petitioner

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED

Whether a sentence of imprisonment and its affirmance on appeal violate the due process clause of the Fifth Amendment and the confrontation and assistance of counsel clauses of the Sixth Amendment where the judge rejected counsel's request that the information in the presentence investigation report be divulged so that he could correct any errors contained therein and the report did contain false and misleading derogatory information.

REPLY TO THE BRIEF FOR THE UNITED STATES

In reply to three points raised in the Brief for the United States in Opposition, petitioner says:

1. The Brief for the United States erroneously states that ". . . petitioner could have been imprisoned for up to five years or fined up to $10,000.00 or both." (Brief for the United States in Opposition, page 2, footnote 2). When petitioner was indicted the offense defined by 21 U.S.C. 331 (q) (2) was a misdemeanor and the punishment prescribed for violation of that statute was imprisonment up to one year or a fine up to $1,000.00 or both.

2. The Brief for the United States correctly states that ". . . petitioner in this case made no request to see the contents of the presentence investigation report before sentencing" (Brief for the United States in Opposition, page 4). No request was made because statements by the sentencing judge gave the impression that the presentence investigation report did not contain any significant information derogatory to petitioner:

> "The Court: . . .
>
> "The court has been furnished a Pre-Sentence Investigation and Report which I have carefully examined, and there is no record therein, as such, of any convictions or any previous offenses against you. I notify you of that.
>
> "There is a report from you that you had some traffic offenses but there have been no serious criminal offenses.
>
> "THE DEFENDANT: No, sir.
>
> "THE COURT: And of course that stands in your favor.
>
> "I mention that because if there were, I would hand them to you and ask you to confirm or deny them; but, since there are none, we won't have that." (Appellant's Appendix to brief in court of appeals, A23-A24)

Petitioner does not assert that the sentencing judge intended to mislead, but the effect of the judge's statements was to lull petitioner and his counsel into assuming that the presentence report correctly stated petitioner's offense and his role in illegal drug traffic, when in fact the report was grossly inaccurate.

3. The Brief for the United States erroneously asserts that "At no point in the record, however, is there any indication that the court considered anything other than the 20,015 pills that petitioner had admitted selling when he pleaded guilty." (Brief of the United States in Opposition,page 5, footnote 3). This statement is inaccurate for two reasons.

First, it gives the impression that petitioner was guilty of more than one sale when in fact the information to which he pleaded guilty alleged only one sale in which 20,015 amphetamine tablets were sold in a single transaction.

Second, at sentencing the judge said "The court has been furnished a presentence investigation report which I have carefully examined . . . "(Appellant's Appendix to brief in court of appeals, A23). In stating the official version of petitioner's offense the presentence report says: "Federal agents reported that at least 5,000,000 tablets passed through the hands of the defendant, and that this operation was dealing in the illegal traffic of amphetamine tablets in large quantities." (Appellant's Appendix to brief in court of appeals, A69). In his evaluative summary the probation officer who drafted the presentence report said: "Bakewell was involved in the possession and sale of illegal drugs throughout the southeastern United States. Agents reported that an estimated 5,000,000 units passed through the hands of the defendant. Primarily, Bakewell was selling only in large quantities to persons who broke these units down and sold them illegally." (Appellant's Appendix to brief in co rt of appeals, A75).

These statements in the presentence report are inaccurate and grossly exaggerate petitioner's participation in illegal drug traffic. He believes that reliance upon these and other misstatements in the presentence report by the sentencing judge resulted in a more severe sentence than would otherwise have been imposed. Petitioner believes that the sentence imposed upon him is based on false and misleading derogatory information which he or his counsel did not have an opportunity to know of, or to rebut. He would like the opportunity to present the true facts to the sentencing judge. This is the basis of his request that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

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